

No. 17721 ✓

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SUNBELT INDUSTRIES DISTRIBUTING CORP., a corporation, and
AMERICAN COVER LOG, INC., a corporation,

Appellants,

vs.

VERNA H. DORAN, WILLIAM E. DOLL and Verna H.
Doran, d/ba PLAST-IT INDUSTRIES, a sole proprietor-
ship,

Appellees.

Appeal From the United States District Court for the
Southern District of California, Central Division.

OPENING BRIEF OF APPELLANTS.

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No. 17721
IN THE

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FOR THE NINTH CIRCUIT

SUNSET HOUSE DISTRIBUTING CORP., a corporation, and
AMERICAN COVER CO., INC., a corporation,
Appellants,

vs.

VERNA H. DORAN, WILLIAM E. DORAN and VERN H.
DORAN, dba PLASTI-PERSONALITIES, a sole proprietor-
ship,
Appellees.

Appeal From the United States District Court for the
Southern District of California, Central Division.

OPENING BRIEF OF APPELLANTS.

Jurisdiction.

This action was brought by Verna H. Doran and William E. Doran, who are engaged in the manufacture, distribution and sale of ornamental plastic figures, for an injunction and damages arising out of an alleged infringement of a copyright and unfair competition. Jurisdiction of the District Court was invoked under the Copyright Laws of the United States, 17 U. S. C. A., and under 28 U. S. C. A., Sections 1338(a) and 1338(b). It was tried on appellees' com-

plaint [R. 2]* and appellants' answer thereto [R. 8] in the United States District Court for the Southern District of California, Central Division, before the Honorable William M. Byrne, Judge Presiding. From a judgment for the plaintiffs [R. 121] enjoining and restraining defendants from infringing the plaintiffs' copyright forming the subject matter of the action, damages in the amount of \$2,291.00, plus \$1,000.00 attorney's fees, appellants have appealed.

This Court has jurisdiction to review the Judgment and the Findings of Fact and Conclusions of Law under the United States Judicial Code (65 Stat. 929; 28 U. S. C. 1291 and 65 Stat. 727; 28 U. S. C. 1294).

Statement of the Case.

Appellees, plaintiffs below, manufacture, distribute and sell ornamental plastic figures used primarily for decorations [T. 6]. Appellant American Cover Co., Inc., also manufactures among many other things, an ornamental plastic figure [T. 110]. It is sold primarily by appellant, Sunset House Distributing Corp. [T. 128]. The particular figures involved in this litigation and this appeal are approximate lifesize reproductions of Santa Claus [Exs. 1, 2 and 6]. These figures are made of vinyl plastic in the nature of a "bag" [Ex. 2; T. 14, 62] which, when stuffed with newspapers or similar bulky material, takes on the shape of a human form, which, in this instance, resembles the popular conception of Santa Claus [Exs. 1 and 6; T. 14-16, 62-63, 74]. The item is sold to the public in its unstuffed form [Ex. 2]. The purchaser must therefore

*"R." refers to the Clerk's Record. "T." refers to the Reporter's Transcript of the trial.

stuff it with newspapers or other appropriate material in order for the item to attain its three-dimensional shape. Its use appears to be primarily as a Christmas decoration, both commercially and in and around the home [T. 22].

In 1958, appellees obtained a copyright [Ex. 3] and submitted a photograph of the appellees' Santa Claus to the Register of Copyrights, pursuant to 17 U. S. C. A 13 [Ex. 20; T. 67]. Appellees' Santa Claus was copyrighted under 17 U. S. C. A. 5(g) as a "work of art." Appellees started selling their Santa Claus in 1958 and continued selling same each year thereafter through the 1960 Christmas season [T. 17]. Appellees' Santa Claus sold retail for \$7.89 [T. 17], \$6.95 to \$7.98 [T. 50, 58, 103], and as high as \$9.98 [Ex. 14]. Appellees' wholesale price in 1960 was \$4.25 [T. 53].

In 1960, appellant American Cover Co., Inc., commenced the manufacture of a plastic Santa Claus figure [Ex. 6; T. 110]. The Santa Claus manufactured by appellant American Cover Co., Inc., was also "life-size" and in the nature of a plastic bag that was to be stuffed with newspapers or other appropriate material and used as a Christmas decoration [Ex. 6]. It sold wholesale for \$3.10 [T. 128] and retail for \$6.98 [T. 95].

The two Santa Clauses, the one manufactured by appellees [Exs. 1 and 2] and the one manufactured by appellants [Ex. 6], are similar in that they both resemble the popular conception of Santa Claus. The idea used to express Santa Claus is the same in that they both use an essentially life-size plastic bag in the shape of the human form to be stuffed with newspapers. and a face mask depicting the popular conception of

Santa Claus affixed thereto. They both have a head, a body, two arms, and two legs.

The costume used by appellees consists of black plastic boots, red trousers and coat, a molded plastic mask, and a molded gold belt buckle with intricate scroll work molded into the plastic [Exs. 1 and 2]. The picture of Santa Claus deposited with the Register of copyrights, pursuant to 17 U. S. C. A. 13, shows a white stripe running from underneath the chin to the bottom of the coat and artificial hair for the beard and hair [Ex. 20]. However, the item ultimately marketed by the appellees only had a white stripe running from under the chin to the waist or belt buckle and did not use the artificial hair for the beard and hair, but merely an impression thereof molded into the plastic mask [T. 8, 9, 64-66].

The Santa Claus manufactured and sold by the appellants likewise had boots, red trousers, and red coat. However, it had no vertical white stripe from the chin to either the waistline or bottom of the coat. The mask used by appellants had an entirely different facial appearance; it was made of buckram, as opposed to plastic, and had a white hairlike beard which was made of entirely different material and was a different shape from the one originally copyrighted by the appellees, and the belt buckle used by appellants was simply a flat piece of flexible plastic material cut in the shape of a belt buckle and was in no way similar to the one used by appellees [Ex. 6; T. 14-16, 20, 21, 64-66, 127, 129-130].

It is contended by the appellees, and it was so found by the Court below, that the Santa Claus manufactured and sold by appellants was a copy of the appellees'

Santa Claus and therefore an infringement on appellees' copyright [R. 121].

The appellees were awarded damages based on 17 U. S. C. A. 101(b), which provides that the copyright proprietor shall be allowed \$1.00 for each infringing copy of his work of art (other than a painting, statue or sculpture, for which \$10.00 is allowed), made or sold by or found in the possession of the infringer or his agents or employees, and thereupon awarded appellees the sum of \$2,291.00. Although the Court apparently found that the appellants had competed unfairly, the Court made no award of damages to appellees for such alleged unfair competition, but based its award of damages solely on the alleged infringement of the copyright [R. 121]. The injunction granted to appellees against the appellants enjoined and restrained appellants solely "from infringing the plaintiffs' copyright forming the subject matter of this action" [R. 121]. There is no mention in the judgment of any award on account of the alleged unfair competition. In addition to the foregoing, the Court, pursuant to 17 U. S. C. A. 116, awarded appellees the sum of \$1,000.00 as and for a reasonable attorney's fee [R. 121].

The Questions Presented.

(1) Did not the Court err in finding that appellees' *entire* Santa Claus was the subject of a valid copyright, in that Santa Claus is part of the public domain and everyone's basic conception of Santa Claus is the same, and only that *part* of appellees' Santa Claus, if any, that was original and non-functional was entitled to the protection of a copyright?

This question was raised by appellants' motion for judgment of dismissal, which was denied [T. 145-155].

(2) Did not the Court err in finding that the appellees had a valid copyright on their Santa Claus figure by reason of the fact that the Santa Claus figure copyrighted by appellees was not the same as the Santa Claus figure sold to the public by appellees?

This question was raised by appellants' motion for a judgment of dismissal, which was denied.

(3) Did not the Court err in finding that appellants infringed on the appellees' copyright, in that the record clearly indicates that only the *idea* and the *functional* aspects of the design were used?

This question was raised by appellants' motion for a judgment of dismissal, which was denied.

(4) Did not the Court err in finding that appellants had infringed on the appellees' copyright, in view of the fact that substantial differences exist between the two Santa Clauses sold to the public?

This question was raised by appellants' motion for judgment of dismissal and in their memorandum filed with the District Court subsequent to the trial [T. 68].

(5) Did not the Court err in finding that appellees owned a valid copyright, in that the Santa Claus copyrighted by appellees was sold to the public in a partially completed form and it remained for the ultimate purchaser to complete it so that it would appear the same as the one copyrighted?

This question was raised by appellants' motion for judgment of dismissal, which was denied.

(6) Is a three-dimensional life-size figure of Santa Claus, used commercially as a Christmas decoration, a “work of art” within the meaning of 17 U. S. C. A. 5(g), when the same is not sold to the public in its three-dimensional “artistic” copyrighted form?

This question was raised by appellants’ motion for judgment of dismissal, which was denied.

(7) Did not the Court err in finding that the appellees’ Santa Claus was the proper subject of a valid copyright, in that it is not a “writing”, “authored” by appellees, as required by Article I, Section 8, of the Constitution of the United States?

This question was raised by appellants Supplemental Memorandum of Contentions of Fact and Law, filed with the District Court on June 22, 1961 [R. 43].

Specification of Errors.

(1) The Court erred in finding that appellees had a valid copyright.

(2) The Court erred in finding that appellants’ Santa Claus was a “copy” of appellees’ Santa Claus and therefore an infringement.

(3) The Court erred in failing to distinguish between the using of an *idea* and the *functional* aspects of the article, as opposed to the copying of the *expression* of the idea itself.

(4) The Court erred in holding that the *originality* of appellees’ Santa Claus lies in its form—three-dimensional—and the medium—plastic.

Summary of Argument.

(1) Appellees' Santa Claus was not a proper subject of copyright.

(2) By finding that appellees' copyright of Santa Claus was valid, the Court in effect has given appellees a monopoly on life-size, three-dimensional Santa Clauses because it is virtually impossible to reproduce a Santa Claus that does not have certain required characteristics, such as a red suit, white stripes, white hair and beard, and rotund appearance, and hence appears to have been copied from appellees' Santa Claus.

(3) Appellants did not copy the appellees' Santa Claus, mainly because appellants' Santa Claus mask (the face of its Santa Claus) was entirely different from the face on appellees' Santa Claus, as well as certain differences in the costume, as more particularly described below.

(4) Appellees lost their right to the copyright protection of their Santa Claus because the Santa Claus they sold to the public was different from the Santa Claus registered with the Register of Copyrights.

(5) The issue of unfair competition appears to be academic.

ARGUMENT.

Appellees Cannot Copyright Santa Claus.

Appellants ask the Court to conjure up a vision of Santa Claus. It is belived that you will see a plump man in a red suit with fringes of white fur or striping on his suit, white gloves, black boots, red hat, black belt and:

“. . . Eyes how they twinkled! His dimples how merry! His cheeks were like roses, his nose like a cherry. His droll little mouth was drawn up like a bow, And the beard on his chin was as white as the snow. . . . He had a broad face and a little round belly That shook when he laughed like a bowl full of jelly. He was chubby and plump, a right jolly old elf . . .”

(“*A Visit from Saint Nicholas*”, written in 1822 by Clement C. Moore.)

This vision will be the same if conjured up by this Honorable Court, the trial judge, the parties to this litigation or a child on the street. It is respectfully urged that the only fundamental difference between the one you will conjure up and the one that this writer will conjure up will be the appearance of the face. The basic fundamentals of Santa Claus’ visual appearance will be identical—only the face will change. Compare the masks used by appellees on their Santa Claus [Exs. 1 and 2] and the mask used by appellants on their Santa Claus [Ex. 6]. Not only is the expression entirely different, but the material is different and the make-up is different. It should be noted that the

appellees used two different masks on their Santa Claus [T. 9, 64]. One had a beard and hair of hair-like substance, and the other had an impression of a beard and hair molded into the plastic mask. The mask used by appellants was at all times the same and had a beard of hair-like substance and was marketed as such. It was purchased from a New York mask company and is a standard "shelf" item [Ex. B; T. 128-130]. One cannot fail to see the difference in the two faces. Appellants urge that the difference in the faces is basic, fundamental and vital, and conclusively establishes that appellants' Santa Claus is not an infringing "copy" of appellees' Santa Claus, since the other similar items, with the possible exception of appellees' belt buckle, are part of the public domain and are not original to appellees. The human form was not originated by appellees, nor was the basic popular conception of Santa Claus. The latter is part of the public domain. In *Barton Candy Corp. v. Tell Chocolate Novelties Corp.*, D. C. N. Y., 178 Fed. Supp. 577 at 582, the Court said:

"The idea of Santa Claus as part of the Christmas motif belongs to the public domain and cannot be withdrawn by a copyright."

It is settled law that a copyright can be infringed only by "copying." (*Silvers v. Russell*, D. C. Cal., 113 Fed. Supp. 119; *Lewis v. Kroger Co.*, D. C. W. Va., 109 Fed. Supp. 484.) Ideas cannot be copyrighted. Functional aspects of items cannot be copyrighted. A design of a thing as such cannot be copyrighted. The only right conferred by a copyright is the right to reproduce the visual expression of the idea, that is, the thing itself.

In the leading case of *Mazer v. Stein*, 347 U. S. 201 (1954), the Supreme Court held that:

“Unlike a patent, a copyright gives no exclusive right to the art disclosed; protection is given only to the expression of the idea—not the idea itself.”

This would clearly seem to eliminate any issue of infringement by reason of the fact that appellants' Santa Claus was similar to appellees' Santa Claus in the idea and function, to wit: a plastic bag which, when stuffed with newspapers and given a mask, achieves a life-like three-dimensional appearance, looking like the popular conception of Santa Claus. The Court went on to say, in *Mazer v. Stein* (*supra*):

“Thus, respondents may not exclude others from using statuettes of human figures in table lamps; they may only prevent use of *copies* of their statuette as such or as incorporated in some other article.” (Emphasis added.)

Only new and original material added to matter already in the public domain is entitled to the protection of a copyright. (*Hayden v. Chalfort Press, Inc.*, 9th Cir., 281 F. 2d 543; *Dorsey v. Old Surety Life Ins. Co.*, 10th Cir., 98 F. 2d 872.) Appellants contend that the only originality, aside from possibly the idea and the function, of appellees' Santa Claus, appears in the mask and the belt buckle, and although not urged by appellees, it is likely that these two items alone could be validly copyrighted under existing law. There is no contention made by appellees that appellants copied appellees' mask and belt buckle. In fact, the Court, in its Memorandum Decision [R. 95], specifically found as follows:

“However, there are certain differences between defendants’ Santa Claus and that of plaintiffs. Defendants did not use a molded belt buckle, but instead cut a more simple item from flat sheet plastic having a somewhat different form and appearance from that of plaintiffs’ belt buckle. Also, the face for defendants’ unit is a flexible mask, while the hood is of cloth instead of plastic.”

Simple observation will clearly demonstrate that the belt buckles are vastly different and that not only is the material used in the mask of appellees’ Santa Claus different, but the facial expression created is quite different.

From the foregoing, it must be concluded that appellees do not have the right to prevent others from producing three-dimensional plastic Santa Clauses and that the originality of appellees’ product does not lie alone in the fact that it is three-dimensional and made of plastic, as the Court apparently indicates in its Memorandum Decision [T. 95]. We respectfully submit that this is not the proper criterion for originality, in so far as the copyright laws are concerned. If this were the proper criterion, a sculptor could obtain a copyright because his statue is three-dimensional and made of marble. The Court apparently recognized this in sustaining appellants’ Objections to the Findings of Fact [R. 116, 120]. It would seem that this misconception, however, subconsciously permeates the Memorandum of Decision [R. 95] and the Judgment [R. 121].

Appellants admit that the *idea* for their Santa Claus was obtained from appellees’ Santa Claus [T. 157]. Appellees can find no consolation in this admission

because, as indicated, the appropriation of appellees' idea is not protected under the copyright law. (*Mazer v. Stein, supra.*) Appellee, Verna Doran, testified that the other features of her Santa Claus other than the mask and belt buckle, are purely functional [T. 62-66]. As stated by the Court below in its Memorandum Decision:

“Defendants concede that their Santa Claus has many *mechanical features* ‘not dissimilar’ to those of plaintiffs’ Santa” [R. 95].

Appellees can find no consolation in *this* concession either. At 37 C. F. R. 1949, Sec. 202.8, we find “works of art” defined as follows:

“Works of Art (Class G)-(a) In General, this class includes works of artistic craftsmanship, in so far as their form *but not their mechanical or utilitarian aspects* are concerned, such as artistic jewelry, enamels, glassware and tapestries, as well as all works belonging to the fine arts . . .” (Emphasis added.)

Appellants also concede that when the two items are stuffed and placed side-by-side on display, there are similarities because they look like Santa Claus. It is respectfully submitted that they also look like every other three-dimensional Santa Claus that is used at Christmas-time, including the Santa Claus sitting in department stores, the Santa Claus standing on the street corner collecting for charity, the Santa Claus hanging on Christmas trees in the form of ornaments, and any other three-dimensional form or use of Santa Claus that one could imagine. This is obviously so, by virtue of Santa Claus' stereotyped appearance. Appel-

lants, however, point out that when the two Santa Clauses are placed side-by-side, the differences are readily apparent [Exs. 1 and 6].

They are different by reason of the appearance of the face. Both the material used in its construction and the expression achieved in these materials are vastly different. This fundamental difference can hardly be characterized as “minor” as found by the Court, both in the Findings [R. 122] and the Memorandum of Decision [R. 95]. The belt buckle, which is a prominent part of Santa Claus’ costume, is also quite different. Appellees’ belt buckle is relatively large and flashy and molded of a hard gold plastic and is very prominent. The belt buckle on appellants’ Santa Claus is a flat, inexpensive, gray-colored piece of soft plastic material that is cut out and is without substantial dimension; the shape of the feet are also different—but, in the final analysis, they are both clothed in red suits with white stripes and are fat and of average height and have a white beard, and no one could mistake that they are both a reproduction of Santa Claus. We submit that this is not enough to constitute an infringement.

Appellees apparently seek to monopolize the technique and art of making this Santa Claus. Appellees have also attempted to monopolize something that is part of the public domain. This problem has been answered as follows:

“Where . . . an author’s monopoly threatens to infringe unduly on the public use of the ideas or objects of that expression, the courts have demonstrated flexibility in adjusting the conflicting theories. Thus, copyrightability may be

altogether denied; or, if copyright is upheld, *restrictively protected by requiring almost verbatim copying to constitute infringement*. In other situations, the subject and purpose of copyright may be explicitly defined as not to authorize an over-generalized monopoly which would restrict fair use of the disclosed information or objects. *Continental Casualty Company v. Beardsley*, D. C. N. Y., 151 Fed. Supp. 28, 32." (Emphasis added.)

Appellees Cannot Obtain a Copyright on a Three-Dimensional "Work of Art" and Sell a Non-Three-Dimensional Article and Also Change the Copyrighted Article and Then Sell the Altered Non-Three-Dimensional Item to the Public, Without Losing the Protection Afforded by a Copyright.

Appellees admit that the Santa Claus copyrighted is not the same as the Santa Claus that they ultimately sold [T. 65-66]. The mask used in the copyrighted item is not the same as the mask they ultimately sold to the public, and the appearance of Santa Claus' coat is different in that a white stripe running from the collar to the bottom of the coat is on the item that is copyrighted, but this was partially removed from the item sold to the public, and the white stripe stops at the waist. The photo deposited with the Register of Copyrights indicates that appellees' Santa Claus has the exact dimension of 6 feet [Ex. 20]. The advertisements used by appellees indicate in one place that the Santa Claus is approximately 5 feet 6 inches [Ex. 17], and another 5 feet 7 inches [Exs. 10 and 11], and still another 5 feet 5 inches [Ex. 14]. Furthermore, the item copyrighted was a three-dimensional

figure; that is, the picture filed with the Register of Copyrights shows the stuffed Santa Claus [Ex. 20]. The item actually sold to the public is only partially complete in that it is in a flat, unstuffed condition, and does not become three-dimensional until stuffed with newspapers by the purchaser. The Santa Claus manufactured and sold by appellants is not three-dimensional.

It is elementary that the copyright affords the proprietor thereof “the exclusive right to print, reprint, publish, copy and vend the copyrighted work.” (17 U. S. C. A. 1.) It is clear that the law contemplates that the proprietor of the copyright is the only one with the right to *copy* the article thus protected. It is not probable that the law would permit one to copy-right an article, make changes in its appearance, then claim infringement of the altered article, even if the altered article were in fact copied.

In *Decker v. Loews, Inc.*, 9th Cir., 133 F. 2d 889, this Court held that:

“The copyright statute can be infringed only by copying the *copyrighted* material, that is, engaging in literary piracy.” (Emphasis added.)

Assume, for the sake of argument only, that appellants unlawfully copied appellees’ Santa Claus. The record clearly indicates that the appellants’ Santa Claus more closely resembles the one marketed by appellees, *not the one copyrighted by the appellees*. Even if we assume, *arguendo*, that appellees’ *altered* Santa Claus was copied, we are faced with the inescapable fact that there are still further differences—the face, the belt buckle and the absence of a white stripe. Conceding,

again for argument, that appellees' Santa Claus is a substantial copy of the one copyrighted, and appellants' a substantial copy of that, we have then a substantial copy of a substantial copy, *ad absurdum*, until a point is reached where the article copied is no longer even a Santa Claus. Appellants find no cases extending the copyright protection beyond its purpose, *i.e.*, the right to "copy" the item protected. (17 U. S. C. A. 1.)

A Life-Size Three-Dimensional Plastic Santa Claus Is Not a "Writing" "Authored" by the Appellees.

Article I, Section 8, of the Constitution of the United States empowers Congress "to Promote the Progress of Science and useful Arts, by securing for limited Times to Authors—the exclusive Right to their respective Writings."

Justice Douglas in his dissent in *Mazer v. Stein* (*supra*), upon considering Article I, Section 8, of the Constitution, lists the following:

"Statuettes, bookends, clocks, lamps, doorknockers, candlesticks, ink stands, chandeliers, piggy banks, sundials, salt and pepper shakers, fish bowls, casseroles and ash trays."

Such items have been copyrighted. Justice Douglas suggests a rehearing and goes on to state:

"Perhaps these are 'writings' in the Constitutional sense but to me, at least, they are not obviously so."

It would appear that there is no square ruling on this question of whether or not items such as the one at issue are properly copyrightable. In a Constitutional

sense, it is difficult to torture the word "Writings" to include any of the items listed by Justice Douglas, as well as the Santa Claus in the case at hand. To so hold would, we believe, be an unconstitutional extension of the copyright law and clearly an extension not intended by the framers of the Constitution, or the Congress.

The granting of a copyright is a limitation on personal freedom and creates in the owner an exclusive property right and therefore should be strictly construed. (*Westway Theater v. Twentieth Century-Fox*, D. C. Md., 30 Fed. Supp. 830, affirmed, 113 F. 2d 932.) The "author's" right to a monopoly of his work is measured and determined by the copyright statute. (*American Code Co. v. Bensinger*, 2nd Cir., 282 Fed. 829.) Copyrights and the rights flowing therefrom are entirely creatures of statutes. (*Lcews, Inc. v. Columbia Broadcasting System*, D. C. Cal., 131 Fed. Supp. 165, affirmed 356 U. S. 43; *Miller v. Goody*, D. C. N. Y., 125 Fed. Supp. 348.)

The Issue of Unfair Competition Appears to Be Academic.

Under 28 U. S. C. A. 1338(b):

"The District Courts shall have original jurisdiction over any civil action asserting a claim of unfair competition when joined with a substantial and related claim under the copyright, patent or trademark laws."

Appellants believe they have clearly demonstrated that the case at hand does not present a "substantial and related claim under the copyright—laws."

Furthermore, while the trial court in its Findings [R. 121] held that appellants had competed unfairly with appellees, the Court did not award appellees either money damages or an injunction. The Judgment [R. 121] relates solely to the damages flowing from the alleged infringement of the copyright.

Conclusion.

Appellees do not have a valid copyright. The Santa Claus sold to the public was not the same Santa Claus for which an application for copyright was made. Appellants did not copy appellees' alleged copyrighted Santa Claus, or the Santa Claus appellees sold to the public. Admittedly, the idea was used and the functional aspects of the Santa Claus were used, but these are not protected by a copyright. The foregoing elements are essential to support a judgment for infringement. The Judgment should be reversed with directions to dismiss the complaint.

Respectfully submitted,

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APPENDIX.

Index of Exhibits.

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